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## The UN Declaration on Friendly Relations and the System of the Sources of International Law

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# Reviews

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*The UN Declaration on Friendly Relations and the System of the Sources of International Law.* By Gaetano Arangio-Ruiz. Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979. Pp. xiii, 341. Price: \$27.50 (paper)

The United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations was adopted as a Resolution of the General Assembly in 1970. Since then, most of the countries in the Third World, actively supported by the Soviet Union and its allies in eastern Europe, have tended to give this document an authority that is akin to that of the Sermon on the Mount. At the same time they, as well as a number of lawyers in the western world, have increasingly argued that resolutions of the United Nations constitute a 'source' of international law, so that, regardless of whether the substance of any such resolution conforms to or contradicts accepted rules of law, its contents are to be treated as law binding even upon states which did not vote in its favour. Professor Arangio-Ruiz of the University of Rome delivered a course of lectures at the Hague Academy in 1972 in which he outlined his views on the relationship between the Declaration and the 'sources' of international law. He has now elaborated this course into a monograph entitled *The UN Declaration on Friendly Relations and the System of the Sources of International Law*.

It is generally accepted among international lawyers that certainly those resolutions of the Assembly which may be considered as 'housekeeping' in character are of binding force. The learned author agrees, but he suggests that not all such resolutions are in fact *interna corporis*, putting forward as an example a budgetary decision under Article 17 "which determines the *quantum* of the member states' obligation to pay contributions, [and] creates, or at least 'quantifies', obligations of member States" (p. 14). It may be suggested, however, that this is merely to state the same thing twice. More generally, he agrees that the Charter and the *travaux préparatoires* clearly give the Assembly no legislative authority in so far as its powers in the political field are concerned (pp. 15 *et seq.*). He points out that "the merely hortatory effect of Assembly declarations has been clearly confirmed by practice" (p. 18), and

that this has been affirmed by the Office of Legal Affairs, which will go no further than to say that a Declaration as distinct from any other resolution may only "be expected to impart . . . a strong *expectation* that Members of the international community will abide by it" (p. 19, italics in text). However, he tends to the view that constant repetition by the Assembly "would represent adequate evidence of the existence of a corresponding customary rule" (p. 23). But surely this is only true if the states which have paid lip-service to the so-called rule by their votes are also willing to accept the rule in practice by complying with it.

Indeed, the author himself appears to concede this (p. 25), although he states that:

Compliance or non-compliance with the allegedly law-making acts is *directly* not more decisive, however relevant, than the actual compliance or non-compliance with treaties. . . may be decisive for the demonstration of the existence of *pacta sunt servanda* (p. 26, italics in original).

But this is to ignore the fact that there is no dispute that treaties are in fact law-making and legally binding and that *pacta sunt servanda* is one of the oldest recognized principles of international law. Disregard of a treaty, therefore, is *ipso facto* a breach of international law. What is at issue in connection with General Assembly Resolutions is the very question of their legal force.

Idealists may well agree with the author's contention that "it is hardly conceivable that a text enacted by an international organ operating under a treaty and concerning the relations of States *inter se* or with other entities, or in any other way the conduct of States at home or abroad could be without value for, or from the point of view of, international law" (p. 39). *Prima facie* this sounds eminently reasonable, but it is submitted that it completely ignores the ideological function that the United Nations and its 'motherhood' resolutions possess for so many of the Members.

As regards customary law, there is probably no dispute as to the suggestion that Assembly recommendations, since they are only part of State practice at large (p. 46)

. . . only provide *material* custom-making stuff . . . The resolution in its material essence is really the *text* as *one element in a congeries of facts* connected with, or related to, the adoption of the resolution and including such adoption (pp. 42-43, italics in original).

Therefore, constant reiteration of a principle in a series of

resolutions — what the author calls the “shouting out” of rules — achieves little:

. . . for the shouted rule to be customary law there still remains to consider the conduct and the attitudes of States with regard to the actual behaviour, positive or negative, contemplated as due by the rule (p. 46).

As a result “the tendency of the United Nations Assembly to “legiférate” by resolution or declaratory resolution has no merit in a *consensus versus consent* development in the formation of the customary rules to which Assembly resolutions may contribute” (p. 52), and it makes no difference even if the resolution in question is unanimous. And, states the author, what is true of the relation of declaratory resolutions to custom is equally true of their relation to international agreements (p. 56), with each resolution purporting to interpret an agreement judged on its own merits (p. 62).

It is for this reason that there is little difficulty in accepting the power of the Assembly to indulge in authentic interpretations of the Charter as such (p. 82), but, as distinct from the Charter, “there will be no more legal value in the interpreting resolution than there was in the interpreted resolution” (p. 83), so that reiteration and *soi disant* interpretation cannot give binding force to any resolution and or declaration which lacked it in the first instance. To the extent that any resolution merely records or reiterates principles already in the Charter there is no problem, but where any innovations are concerned, their legal effect depends on inter-State agreement or custom (p. 86). This is, of course, particularly true of any Declaration that has come through the medium of the International Law Commission, which was not the case with the Friendly Relations Declaration for this was intended to be political in purpose, discussion and adoption. It is, in fact, “an instrument of a purely hortatory value” (p. 93). In so far as the principles embodied therein are already principles of international law or are paraphrases of obligations in the Charter, the Declaration has no effect whatever. This fact, however, does not mean that innovations possess the same status. They, at most, constitute *lex ferenda* (p. 93).

The learned author draws attention to the drafting history of the Declaration to remind us that it was to a great extent the product of attempts to harmonize the views of East and West and of the developed and the developing nations. In other words, in his view its purpose was the “co-ordination of international legal systems”

(p. 148), although he does not concede that there can be separate international legal systems, for it is of the essence that international law should be universal in character (p. 153). It much be borne in mind, however, that there can be regional deviations setting up rules which are binding among the members, as there can be bilateral international law, and this he recognizes in his references to ideological and similar groupings (pp. 154, 157, 169). The ideological situation at the time was largely responsible for the adoption of the principle of self-determination into international law. As the author reminds us:

Decolonisation has been essentially the outcome of a historical process seconded by a number of favourable circumstances, ranging from local situations determined by events of the Second World War to the policies of two great powers not involved in the traditional forms of colonialism, and to the spontaneous realisation, on the part of some of the interested governments, that colonialism was obsolete. Decolonisation, in other words, has been the result not of *legal* or *public* policies but of policies *tout court* (p. 183, italics in original).

However, with the ratification of the two Human Rights Covenants, both of which proclaim the right to self-determination in their opening article, this right may now have acquired legal status.

As to the Friendly Relations Declaration and its significance, Professor Arangio-Ruiz states that its "vagueness, scarcity of progressive content and the lack of an adequate co-ordination between conflicting or partly conflicting principles" do not recommend it as a source of legal policies, contrary to what one might have expected after the seven years of work which were devoted to

. . . setting a landmark in the progressive development and codification of international law. The declaration seems bound to remain. . . little more than an object of recitation on the part of the same organ from which it emanates, and a relatively organic assembly of materials of lego-diplomatic jousting among States within and without the United Nations (pp. 184-85).

As well as the healthy debunking of the Friendly Relations Declaration demonstrated in this last statement and throughout his book, Professor Arangio-Ruiz's *The UN Declaration on Friendly Relations and the System of the Sources of International Law* constitutes a most useful contribution to the jurisprudence of international law, especially in relation to the status and significance

of United Nations resolutions and the whole problem of the 'sources' of international law.

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*The Principle of Sovereignty Over Natural Resources.* By George Elian. Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979. Pp. xi, 238. Price: \$42.50.

The publishing house of Sijthoff, now Sijthoff & Noordhoff, has long had a reputation as one of the most important publishing houses in the field of international law. Its recent series of documentary volumes, often published in co-operation with Oceana in New York, has provided international lawyers with a mass of raw material they would otherwise have had difficulty in securing. Occasionally, they have published in English works by scholars in the Communist world which show how close their views are to those of their colleagues elsewhere, regardless of issues of ideology. One such issue, which has been elevated to a principle of international law largely through the combined efforts of the socialist and the newly independent countries, is that of sovereignty over natural resources, which to some extent at least has played havoc with old concepts regarding the non-expropriation of foreign-held property (see ch. 5.1, pp. 141-54).

The Charter of the United Nations affirmed the principle of the sovereign equality of all and introduced into international law the concept of good neighbourliness as well as that of absolute independence and self-administration. Also, in the *Customs Union* case the Permanent Court of International Justice indicated that true independence meant economic as well as political sovereignty. It is therefore perhaps not surprising that this group of states found it possible to argue that the Charter itself guarantees to each state

... the prerogatives of complete sovereignty over the natural riches and resources of its territory, which (once political independence has been obtained) become national riches and resources of the new State. It is only the nation concerned, by itself and without any foreign interference, that has the competence to decide about its future destination (p. 24).

This view underlies all the United Nations measures relating to the principle of sovereignty over natural resources and is the basis of much of Dr. Elian's thought (p. 120, etc.).

Dr. Elian, formerly Rumanian Ambassador to the Netherlands, is not only concerned with the General Assembly's resolution on this matter, but illustrates how the activities of other organizations in the field of freedom of commerce and coordination of supplies helped to lay the foundation for the recognition of this principle. He gives us the following reminder:

One of the practical uses of the United Nations, and one which is worth emphasising, is that of bilateral contacts established at the Organization's meetings. It is common knowledge [-it may be among diplomats, but it is not quite so common among laymen-] that extremely important diplomatic contacts take place in the lobbies and halls of the Organization, particularly in New York.

Also well-known are numerous cases in which establishing or resuming diplomatic relations between States has been initiated and sometimes negotiated at the United Nations on the occasion of General Assembly or other meetings (p. 84).

It has been reported, for example, that the first steps leading to the rapprochement between Israel and Egypt were taken in this way. While no one would deny that the General Assembly has played some part in the development of international law, particularly when it has been responsible for drafting conventions in regard to "the establishment and development of the principles of modern international law" (p. 84), sometimes with and sometimes without the cooperation of the International Law Commission, it perhaps goes too far to describe it as playing "the major part" in this process. Moreover, there may be some dispute, especially on the part of lawyers in the western world, as to the validity of his view that the Friendly Relations Declaration is "one of the most important of the documents" so elaborated,<sup>1</sup> and the same is true of his estimation of the importance of some of the other documents to which he refers (pp. 84-85).

Most western lawyers are still of the opinion that Declarations of the General Assembly have no more binding authority than any other Resolution, and this is the view taken by the Legal Division of the Secretariat. On the other hand, it cannot be denied that these manifestations of world opinion often play a part in setting standards of international conduct and may well become sources of

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1. See, for example, Gaetano Aranjio-Ruiz's comments in his book, *The UN Declaration on Friendly Relations and The System of the Sources of International Law* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979)

law if they are complied with in practice by members of the United Nations. It is difficult, however, to accord such legal force even to the Charter of Economic Rights and Duties of States when it is worded in such terms as "it is the duty of States to contribute to the development of international trade of goods, particularly by means of arrangements and by conclusion of long-term multi-lateral commodity agreements, where appropriate and taking into account the interests of producers and consumers" (Art. 6, c.p. 120). At most this amounts to a *pactum de contrahendo* and its status is not changed by stating that

. . . [f]rom the juridical point of view, all States are equal in their relationships. As equal members of the international community States are entitled to participate effectively in solving the world's economic, financial and monetary problems . . . [and] have an obligation towards the growing liberalization of world trade (pp. 120-21).

And is anything gained from the legal point of view by such statements as

What characterizes the Rumanian conception of the new order is primarily the identification of profound injustice in economic relations, as well as the necessity for inequality in these relations to be removed through the engineering of a new international economic order. Being incompatible with the maintenance of current relations, the new order rejects the preservation on our planet of relationships arising out of imperialistic, colonialistic or non-colonialistic policies (p. 191)?

Behind the ideological 'mumbo-jumbo' there may well be reference to a deepseated problem and recognition of the need to remedy it. But the issue involved is political rather than legal, even though its political settlement may require and produce a new legal framework. In the achievement of this, however, it would be well to avoid emotional value terms and to seek a basis for legal development that avoids confusing legal and political issues, with the implication that law is but the hand-maiden of politics, for if this be the case the law will be ever-increasingly disregarded at the demand of politics and, indeed, such disregard will appear to be justified.

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*A Theory of Criminal Justice*. By Hyman Gross. New York: Oxford University Press, 1979. Pp xviii, 521. Price: \$20.95

Hyman Gross does not invent a conception of criminal justice. He discovers it "in the principles that are generally aimed at by the criminal law in every civilized society of a more or less liberal democratic complexion" (p. xv). He discovers not a new world but new vitality in an old one rooted in the jurisprudence of Bentham and Austin. He offers a profound analysis of the principles of criminal law and the theoretical framework which gives them meaning. In so doing, he has made a distinguished contribution to the re-examination of Anglo-American criminal justice.

Professor Gross begins with an inquiry into the purpose of criminal justice, and he describes and criticizes three conceptions: criminal justice as social criticism of an offender, which alone makes sense of modern criminal law; criminal justice as moral criticism of the offender — a conception which is not served and should not be served by the criminal law; and criminal justice as a means of removal and correction — a conception which is frustrated by the criminal law.

The rules with respect to all crimes — common crimes such as murder, rape and theft; crimes referable to conduct which is generally thought to be wrong but not criminal unless the law says so; and conduct which is not really thought to be wrong but which is proscribed — make life in our society possible. Punishment for their violation is necessary in order for the rules to be taken seriously. This is the foundation of Professor Gross's theory of criminal justice. He recognizes the overlap of criminal law and morality but the justification of punishment lies not in the immorality of the offender's act, but in the necessity of enforcing the rules. There is a moral obligation to punish, but it is an imperative required by the social contract between individual and state in which the individual foregoes retaliation in return for the State's promise to protect him from the harm which the rules prohibit. To the moralist who urges that crime and immorality are coextensive, Professor Gross replies that conduct may be culpable without being morally wrong and morally wrong without being culpable. Dudley and Stephens,<sup>1</sup> and the fictional Speluncean Explorers<sup>2</sup> committed immoral acts but

1. (1884), 14 Q.B.D. 273

2. Lon L. Fuller, *The Case of The Speluncean Explorers*, (1949), 6 Harv. L. Rev. 6616

they would not have been culpable on Gross's theory because "the law must be designed to allow with impunity what ordinary men must ordinarily do in the circumstances, even when the extraordinary character of their circumstances requires them in desperation to do what is morally reprehensible" (p. 292).

Morality is important as a basis for scrutiny and criticism of criminal justice, but it is the concepts of responsibility and culpability which are key in determining liability and administering criminal justice. For the actor to be liable, he must be responsible for conduct which is culpable, which he is if he violated the law though he was able to do otherwise, and if his conduct is intentional, harmful, dangerous and not justified by the interests which prompt it. Intention is most important because it refers exclusively to conduct as distinct from events and it is only conduct which is capable of being criminal.

Professor Gross asserts that "an act posing a threat of harm must be done intentionally if it is to be judged a culpable act; and the extent of culpability depends upon the magnitude of the threat of harm that exists because of what was done intentionally" (p. 83). The magnitude of the threat of harm depends upon whether the intentional illegitimate act was purposely directed to the harm, whether the potential for harm was known to exist, whether the actors were indifferent to the potential for harm, or whether the actors did not take adequate precautions against the realization of the potential for harm: purposefulness, knowledge, recklessness and negligence. It depends also on the seriousness of the harm and whether there is only a threat of harm or whether the threat or even the harm itself is imminent.

Professor Gross criticizes orthodox theory which assesses liability in terms of *actus reus* and *mens rea*. Because acts are not simply bodily movements, the analysis of criminal liability in terms of the coordination of bodily movements by a directing mind is inadequate. Since whether conduct which threatens harm is criminal depends on whether the actor could have chosen to do otherwise, his state of mind may be important to the extent that it affects his ability to exercise this choice. It may also be important because the actor's purpose in acting affects his culpability in relation to the nature and severity of the harm threatened by his act. But the view of *mens rea* as state of mind which accompanies his act rather than as part of his conduct itself is a source of confusion in orthodox theory.

An actor may deny criminal liability by asserting either that he

was not responsible for his conduct or that it was not culpable. The distinction between ‘responsibility’ and ‘culpability’, as Gross uses these words, is essential to an understanding of the framework of his theory and the organization of the book. A person may be responsible for conduct — eligible for blame — though it may be determined that his conduct is not culpable or blameworthy. An actor may successfully deny eligibility for blame by claims relating to his conduct (‘conduct-regarding’ claims of exculpation), or to himself (‘actor-regarding’ claims of exculpation) or to the interest in which he acted (‘interest-regarding’ exculpatory claims). He is not responsible if he did not act, if he did not do that with which he is charged, if that with which he is charged is not an act, if the harm which is essential to his liability was not caused by his act, or if his act was involuntary or not really an act at all. Nor is he responsible if he was unable to do other than as he did on account of mental abnormality, infancy, compulsion, justifiable ignorance, entrapment, provocation, or if it was not possible to comply with the law.

The actor may deny culpability for some of the same reasons he denies responsibility, but here the claim focusses on the criteria for culpability mentioned earlier. There may be no intentional conduct, or the conduct may not be sufficiently dangerous to meet the requirements established by the law for the crime charged either because it did not threaten harm of concern to the law or that harm was not foreseeable. Alternatively, the accused may raise an interest-regarding claim which asserts the legitimacy of what was done though all other requirements of culpability are present. If the interest which is served by doing harm is recognized within the law of justification, the actor may have a defence.

This is the general framework in which Professor Gross examines in detail conduct-regarding and actor-regarding exculpatory claims. In Chapter 6 he considers conduct-regarding claims focussing on the problems of attempts and causation. He takes issue with orthodox analyses of attempt problems which distinguish the actor’s conduct on the basis of preparation, attempt and consummation. He also rejects the traditional dichotomy of legal impossibility and factual impossibility. Gross asks: Was a true threat of harm posed by the actor’s conduct? If his conduct was unambiguous, if his commitment was not in doubt and if he puts himself in a position to inflict the harm which the offence is concerned with, he may properly be held liable. But the harm must be threatened, which it is not if there is no harm-threatening conduct, as is the case in most

legal-impossibility situations, or if the actor does not have reason to believe that the harm he intends will occur, which may be the case in some factual-impossibility situations.

In a masterful analysis of causation, Professor Gross distinguishes between an explanatory theory of causation which seeks to validly account for cause-effect relationships, and a liability theory of causation which explains the cause of harm which is of concern to the criminal law. Liability theory requires that the explanatory theory be satisfied only in the sense "that it is not the case that no act of the accused was the cause (in an explanatory sense) of the harm" (p. 239). Once satisfied, we can safely determine cause on the basis of considerations peculiar to a theory of criminal liability which assesses harm which the accused's conduct produces. If the harm which occurred was not foreseeable, or if the expectation of the harm is slight, the accused may successfully challenge the allegation that his act was a cause of the harm. Professor Gross emphasizes as well that criminal liability is concerned with the accused's conduct as 'a' cause of the harm rather than 'the' cause. Whereas in explanatory accounts, "we will choose as the cause the element that best instructs us as to how that harm might have been avoided" (p. 245), a liability theory will not countenance the disqualification of an act which qualifies as a cause by another act, perhaps more important in explanatory theory, which also qualifies as a cause.

Professor Gross next discusses actor-regarding exculpation — ignorance, mistake, compulsion and mental abnormality. These are true excuses which are properly recognized by the criminal law though there are limits to the excuses which can be recognized. That they are properly recognized, in Gross's view, is apparent in his discussion of the contrasting views of H. L. A. Hart and Lady Wootton. That there are limits to the excuses which can be made is apparent in his arguments in Chapter 8 in response to "persistent themes" raised by critics of criminal liability. To the critic who points to conditioning influences beyond an accused's control which made him act as he did, Gross answers, "to be responsible for one's conduct it is not necessary that one be responsible for those things without whose influence one would not have acted as he did. It is necessary only that one be able to frustrate their effect" (p. 322). To the determinist who asserts that the criminal is thoroughly subject to nature's influences, Gross replies, "it is not the case that, whenever a person could not do otherwise, he is not responsible for what he

did. . . In order not to be responsible, the actor must have acted as he did *because* he could not do otherwise” (p. 325). The distinction here is valid if criminal justice is viewed as social criticism of an offender. A person may be appropriately criticized for doing as he did even though he could not do otherwise, perhaps because he may have wanted to do it regardless. As an answer to the determinist who would deny criminal liability because there is no choice in fact, it is wanting. Gross’s reply to the less rigorous determinist who would pardon criminal behaviour once he understands its causes is more convincing. He argues that condemnation is compatible with understanding: “for criminal liability it is the culpable character of conduct that matters, and not the attitude which may be expected in the light of what is or may be understood” (p. 328).

There follows Professor Gross’s discussion of the justification of punishment as an appropriate response to criminal liability. Punishment is justified if it is useful; i.e., if it accomplishes a necessary goal, and if it is needed; i.e. if there is no better way of accomplishing the same goal. Common theories do not satisfy one or both of these requirements and so fail to justify punishment. The theory that punishment is necessary to remove dangerous persons from society fails on both counts: punishment for this purpose is useless because the common method of punishment, imprisonment, breeds dangerous conduct, and it is needless because dangerous persons are not readily identified by a process which determines criminal liability. Rehabilitation theory fails because punishment does not rehabilitate and because many who are subject to punishment do not need rehabilitation because they are not dangerous. The theory that a lawbreaker, in undergoing punishment, pays a debt to society is inadequate because criminal penalties restore neither to society nor to a victim the loss which has been suffered, nor do they discharge the lawbreaker from an obligation which he has incurred. Deterrence theories which emphasize intimidation and persuasion do not suffice as general theories because no distinction is made between instances in which intimidation might work and those in which it would not and there is no relationship between the degrees of temptation associated with particular crimes and severity of punishment. Moreover, when the threat of intimidation becomes a reality, punishment fails to deter.

Gross prefers the theory that punishment is justified where it is necessary to ensure that “the law is to remain a sufficiently strong influence to keep the community on the whole law-abiding and so to

make possible a peacable society'' (p. 401). This too is a deterrence theory but one in which criminal penalties maintain the rules as standards compelling allegiance and not just as guidelines to which conduct should conform. To state the theory is not to justify the punishment. This theory too must meet the tests of usefulness and need which it does, in Gross's view, because in the absence of punishment, the influence of law (if it could then be called law) would be insufficient to keep some or many law-abiding people law-abiding.

Gross emphasizes that it is justification of punishment as it is practiced with which he is concerned. However, his critique of common theories of punishment is valid only because current penalties are not based on a rational scheme which reflects a particular theory. Criminal penalties represent a legislative reaction to the prohibited conduct which combines, willy nilly, ideas or assumptions rooted in several or all theories of punishment. Gross's justification of punishment is a theory which justifies punishment only in principle because its usefulness and need cannot be demonstrated other than by reference to assumptions about human nature — perhaps very reliable assumptions, but assumptions nonetheless. However, this theory is important because of his emphasis on the relationship between liability and culpability. An offender deserves punishment for liability based on culpability, and such punishment may be necessary to keep the rules effective. Greater punishment than that which is deserved is never necessary for this purpose though less punishment may suffice. For example, even if capital punishment is deserved for a crime (which Gross does not concede) we may still condemn the crime sufficiently by less severe punishment. Indeed the principle of mitigation compels us to do so.

Professor Gross asserts that legislators and courts indulge regularly in excessive punishment and he urges rejection of appeals for disproportionate uniformity (the punishment of all serious crimes by uniformly drastic measures). And we should as well overcome the inequitable disparity of sentences which is rooted in judicial notions about punishment (as distinct from theories of punishment) and aggravated by unevenness in the quality of legal representation. He appeals for a uniform set of sentencing standards which would structure the exercise of discretion to ensure that it conformed to principles of criminal justice and which would more readily facilitate appeals of sentences.

It has been possible in these pages only to offer a general outline of what this reviewer considers to be the essentials of Professor Gross's theory of criminal justice. A study of this theory requires great care with close attention to the excellent examples provided by the author. The reader may conclude, as I have done, that this is one of the two or three most important books on Anglo-American criminal law to be published in recent years. It is of great interest not only to scholars who have worked for years in this field, but also to the novice who seeks to discover the principles of criminal liability in statutes and case law. By providing a masterful account of these principles, Professor Gross offers a sound basis upon which the criminal law can be criticized, evaluated and reformed.

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*Canadian Income Taxation.* By Edwin C. Harris. Toronto: Butterworths, 1979. Pp. xxiv, 840. Price: \$32.50 (cloth), \$25.00 (paper).

Almost inevitably, the student of income taxation begins with the belief that he is taking on a hopeless task. The sheer size of the Income Tax Act, a statute that with regulations and application rules now fills twelve hundred pages in one commercial edition, perhaps is explanation enough of his sense of frustration. But he soon comes to appreciate that competent advice must also take account of published statements of administrative policy (currently over six hundred in number in various forms) and of an ever growing body of tax jurisprudence. Once it has been pointed out that significant amendments to the Act can be expected annually, the student's despairing reaction may indeed appear justified.

One pragmatic response to the problem of complexity is specialization. While no Canadian law faculty has yet attempted to match the more than twenty taxation offerings of New York University, the subject is routinely broken into a number of discrete courses. Each of these concentrates upon a particular portion of the whole — capital gains tax, taxation of corporations and shareholders, income tax policy and *inter vivos* and testamentary

planning are common titles. Further, the student or practitioner seeking guidance on a specific tax issue can choose from an impressive array of sources, including the very useful papers and journal articles published by the Canadian Tax Foundation and five looseleaf services which attempt to provide up to date commentary on the legislation and case law.

To those with the time to undertake the necessary studies or the background required to use a tax library effectively, this sort of specialization does make excellent sense. But unfortunately it may do more to intimidate the generalist than to make the scheme of Canadian income tax legislation accessible and comprehensible to him. What the occasional traveller to the strange land of tax law needs first is a reliable guidebook, not a series of detailed topographic maps.

For these reasons, it is a pleasure to welcome the publication of Professor Harris's excellent book, which he describes as "an introductory (but not elementary) treatise on Canadian income taxation" (page v.). As the report of the Symons commission<sup>1</sup> reminded us not long ago, the shortage of integrative studies covering basic subjects can be regarded as one of the principal failings of Canadian legal scholarship. Since the author who seeks to keep abreast of a constantly changing and expanding subject condemns himself to the fate of Sisyphus, this general pattern is understandably repeated in the field of income taxation.<sup>2</sup> While Professor Harris points out in the preface that his book is designed primarily for students of accounting and business rather than as a legal treatise, it offers a good deal to the legally trained reader as well.

The Shorter Oxford English Dictionary defines a "treatise" as a "book or writing . . . containing a methodical discussion or exposition of the subject".<sup>3</sup> In both its scope and style, Professor Harris's work conforms to this definition; its seventeen chapters provide a clear and systematic review of the major structural components of the Income Tax Act. Further, more than twenty-seven hundred footnotes supplement the text with references

1. T. H. Symons, *To Know Ourselves: The Report of the Commission on Canadian Studies*. 4 vols. (1975).

2. One excellent general work, prepared for use by the Law Society of Upper Canada, is A.R.A. Scace, *The Income Tax Law of Canada* (4th ed; 1979). It is interesting to note that the present edition lists seven contributors, in addition to the principal author.

3. Vol. II. (1973), p. 2354.



to case law, regulations and administrative statements as well as a sampling of detailed papers written on particular subjects.

Throughout the book Professor Harris has employed a tripartite organizational structure. An introduction to the subject under consideration precedes a statement of the relevant principles or basic rules; a final section provides a detailed elaboration of material of more specialized interest. This format is especially useful for the general reader, and for the most part it is utilized very effectively. The author's treatment of eligible capital property (pp. 190-98) is an excellent example.

The book's treatment of the complex statutory provisions governing corporations and shareholders might benefit, however, from an expansion of the existing "overview" material. Chapter 14 (the book's longest and one of the most useful to the practitioner) moves directly from the classification of corporations to a quite detailed consideration of tax rates and credits. Only later in the Chapter are some of the basic policy considerations which have shaped these provisions dealt with at any length. Thus the principle of neutrality (as implemented through the "integration" mechanism) is treated under the heading of taxable dividends sixty pages into the chapter. Indeed the fundamental rule that income earned by a corporation is subject to tax at two levels appears over forty pages from its start (at p. 613). While the entire book is extensively cross-referenced, a lengthier introduction covering basic principles would assist the reader to orient himself.

Certainly one of the most frustrating and intimidating features of the Income Tax Act is the mathematically inspired "newspeak" which has increasingly been used by its draftsmen.<sup>4</sup> Professor Harris provides a great service by explaining succinctly and lucidly some of the Act's most complex language. From this detailed examination of selected sections the reader can obtain not only useful substantive information but, more important, the confidence and ability to interpret other similarly drafted provisions himself.

As Professor Harris's book is intended to be used for teaching purposes (and accordingly includes extensive illustrations and discussion questions), it seems appropriate to conclude by commenting on it from a pedagogical perspective.

An instructor of income tax can choose from a wide variety of

4. For an informative and entertaining exchange on the question of how the Act came to read this way see "Tax Simplification" in *Proceedings 27th Tax Conf.* 7 (Can. Tax Foundation, 1975)

teaching methods. Some use extensive analysis of case law to develop rules of statutory interpretation and the ability to predict the course of future decisions. For similar reasons, many rely heavily upon problem solving. Still others prefer to emphasize the resource allocation decisions and policy preferences which now seem all pervasive in legislation originally intended for revenue raising purposes alone. Presumably all teachers in professional faculties must take account of the shared academic backgrounds and probable career paths of their students.

Professor Harris's principal aim is to give the reader a grasp of the basic structure of Canada's income tax legislation. Because of this, the book is both a useful reference work and an excellent base for further, more specialized study. A seeming emphasis upon the statute at the expense of case law and broad policy analysis could be ascribed to the needs of the book's business and accounting audience. But the legally trained reader should perhaps bear in mind the words of Dean Griswold of Harvard Law School:

Here [through the study of income tax] is an opportunity, almost unique . . . , to study a complete and self-contained system. Here is an opportunity to come into contact with perhaps our most experienced administrative agency. Here is an opportunity to deal with a statute, not as some excrescence of the common law, but as the law, to trace its growth, to learn how it is given meaning and how that meaning changes. Here is an opportunity to deal with authoritative judicial decisions — or at least, and perhaps more important, to consider how far they are authoritative . . . . Here as elsewhere it is understanding and knowledge of the process that is sought.<sup>5</sup>

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5. E. N. Griswold and M. J. Graetz, eds. *Federal Income Taxation: Principles and Policies* (1976), p.xvi citing the preface to *Griswold's Cases on Federal Taxation* (1st ed; 1940.)



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